

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

FRANCISCO JAVIER ROMERO,
Petitioner.

No. 2 CA-CR 2013-0444-PR
Filed January 28, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Maricopa County
No. CR2002090413
The Honorable Dawn M. Bergin, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Judge Eckerstrom and Judge Miller concurred.

ESPINOSA, Judge:

¶1 Petitioner Francisco Romero seeks review of the trial court's dismissal following an informal status conference of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. For the reasons set forth below, we grant review but deny relief.

¶2 A summary of the procedural history of this case is helpful to understand Romero's arguments on review. After a jury trial in 2002, Romero was convicted of four counts of manslaughter and three counts of aggravated assault. The trial court sentenced him to concurrent and consecutive, aggravated prison terms totaling thirty-one years. His convictions and sentences were affirmed on appeal. *State v. Romero*, No. 1 CA-CR 03-0151 (memorandum decision filed Mar. 23, 2004). In 2005, Romero filed his first petition for post-conviction relief; this court denied review of his petition for review from the court's denial of that petition.

¶3 In 2006, Romero filed a second petition for post-conviction relief, asserting he was entitled to a new trial based on a claim of newly discovered evidence that "the jury panel that convicted him was not drawn from the master jury list of the county, but selected by an algorithmic program that was weighted to select jurors residing closest to the court center." The trial court permitted the matter to proceed, and in an order filed on March 6, 2007, it set an evidentiary hearing for April 2007 "on the issue of whether [Romero] received a trial before a fair and impartial jury," noting it believed "the method of selecting the voir dire panel . . . was not in accordance with the statutory scheme and therefore not in conformity with the requirements of the Arizona State

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Constitution.” The court further found, “[w]hether this error was waived, or otherwise subject to preclusion, or is reversible or harmless error, as well as the other issues raised and not yet ruled on, will be the subject of the evidentiary hearing.”

¶4 In an order filed just a few days after it had set the evidentiary hearing, the trial court stated it had

received information that cases involving Constitutional challenges to Maricopa County’s use of the Proximity Weighted Summoning System [PWS] like those raised by [Romero] in his Petition for Post-Conviction Relief are currently being heard by Judge William O’Neil of the Superior Court of Pinal County under consolidated Cause No. CV 2006-12150. The information this Court has received regarding the nature and thoroughness of the proceeding being conducted before Judge O’Neil, as well as the need for consistent handling and judicial economy, indicates that the issues raised by [Romero’s] Petition for Post-Conviction Relief should be decided in light of the record established before Judge O’Neil.

¶5 Accordingly, the trial court transferred the matter to Judge O’Neil, vacated the April 2007 evidentiary hearing, rescinded its previous findings that “the [PWS system] used by Maricopa County to form the voir dire panel in [Romero’s] case did not select jurors in accordance with statu[t]e as required by the Arizona State Constitution,” and noted it was “of the opinion that findings regarding the constitutionality of the [PWS system] should be made in the consolidated matter before Judge O’Neil.” In April 2007, Judge O’Neil directed that Romero be provided with the “expansive ruling” he had issued on August 9, 2006, “regarding the jury selection process in Maricopa County.” He also determined that Romero was “subject to that ruling,” which in part deemed those

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parties who objected to the current jury selection process “petitioners,” and those who believed the process to be legal “respondents.”

¶6 In his October 2007 ruling in the consolidated matter, Judge O’Neil explained that in approximately 2002, without administrative order or notice to the public or the bar, then-presiding judge of the Maricopa County Superior Court Colin Campbell had “implemented the [PWS system] for jury selection . . . in Maricopa County,” an event that was not widely known until 2006. Although Judge O’Neil characterized Judge Campbell’s method of implementing the PWS system as “more than unfortunate” and “an arrogant use of his power,” he nonetheless concluded “[t]he implementation of the PWS [system] is not illegal on the basis of the method [Judge Campbell] used.”

¶7 Judge O’Neil further explained that in 2006, Judge Barbara Rodriguez Mundell, then-presiding judge of the Maricopa County Superior Court, had directed him to determine whether “Maricopa County [is] randomly selecting jurors’ names from its master jury list, as is required under A.R.S. §§ 21-312 and 313?” Judge O’Neil noted “Objection was raised to the Presiding Judge’s order of transfer of this issue to this Judge, and a motion to reconsider was also submitted. The objection was overruled and the motion for reconsideration was denied.” He also found that, although the petitioners (in thirty-seven separate cause numbers, including Romero’s case), did not “concede” that Maricopa County had jurisdiction to frame and consolidate an issue for hearing by another court, or to consolidate the petitioners and designate an attorney to represent them, because the petitioners had not objected on these grounds, the court was “not inclined to address them.”

¶8 Most notably, Judge O’Neil concluded “this court is satisfied that PWS is random. It affords each individual on the master jury list an equal probability of being selected for jury service. Nothing more is required under [former] A.R.S. § 21-312.” Judge O’Neil also reasoned, “[t]he jurors in Maricopa County under the PWS system were selected randomly in that they were chosen in

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an unbiased manner, with no predetermination of who would be selected.”

¶9 The petitioners in the consolidated matter, including Romero, filed a direct appeal asserting Judge O’Neil improperly had determined that “the PWS system is ‘random’ as required by [former A.R.S. §§ 21-312 and 21-313].” *In re Jury Selection Process in Maricopa Cnty.*, 220 Ariz. 526, ¶ 5, 207 P.3d 779, 780-81 (App. 2009) (footnote omitted). On appeal, we found we lacked “a final judgment with regard to any completed matter,” and because we had only “one issue, drawn from thirty-seven cases, the resolution of which was presumably incorporated by the judges in those individual matters,” we determined we lacked appellate jurisdiction to address the issue presented. *Id.* ¶¶ 8-9.

¶10 We also recognized that in the absence of appellate jurisdiction, we have the ability to take special action jurisdiction. *Id.* ¶ 10. But, we reasoned, without the ability to consider whether prejudice had occurred in each of the consolidated matters, a determination that was impossible based on the record before us, we declined to exercise that jurisdiction. *Id.* ¶¶ 12-13. Importantly, however, we also found that “Our holding is without prejudice to any party seeking relief from Judge O’Neil’s ruling in the individual matter in which the ruling was relied upon.” *Id.* ¶ 14.

¶11 In 2009, Romero filed a motion to sever his case from the consolidated matter, asserting the consolidated “litigation group” no longer existed in light of the dismissal of the direct appeal, and asking the trial court to set a status conference “to chart a future course for [his] case.” In the absence of any ruling from the court, Romero filed a renewed motion to sever in 2011, two years after he had filed his first such motion. The court granted Romero’s motion to sever in June 2011, and after granting several requests to extend the time to file another Rule 32 petition, Romero filed a successive petition for post-conviction relief in March 2012. This petition for review followed the court’s dismissal of that petition.¹

¹We note that the trial court’s July 2012 ruling, upon which Romero’s petition for review is based, addressed only his March

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We will not disturb that ruling unless the trial court has abused its discretion. See *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find no such abuse here.

¶12 In its ruling dismissing Romero’s petition, the trial court addressed the following arguments, which he had raised in his 2012 petition for post-conviction relief: (1) the trial court’s first March 2007 order finding Romero was entitled to an evidentiary hearing on the jury selection issue, an order it later rescinded, “left open an opportunity for [Romero] to raise issues such as waiver, preclusion and prejudice”; (2) Judge Mundell lacked “authority” to consolidate the cases and refer them to Judge O’Neil; (3) Pinal County, where Judge O’Neil was a superior court judge when he ruled in the consolidated matter, did not have jurisdiction to rule in this matter;² and, (4) Judge O’Neil’s ruling was incorrect. After addressing claims one through three on the merits,³ the court relied generally on

2012 petition for post-conviction relief. Romero nonetheless states in his petition for review that he “petitions for review from the dismissal of his second petition for post-conviction relief, filed October 26, 2006.” Although the procedural history of this matter admittedly is unusual, there is nothing in the record to suggest the court should have or in fact did consider the 2006 petition in its July 2012 ruling. In fact, the court expressly noted in its ruling that it was addressing Romero’s “successive PCR” filed on March 8, 2012. Moreover, the record does not support Romero’s assertion that he “re-filed” his 2006 petition in 2012, nor did he ask the court to incorporate his 2006 petition into the one filed in 2012. And, although the two petitions contain many of the same arguments, the 2012 petition cannot reasonably be characterized as a “re-filing” of the 2006 petition.

²We note that the matter was not transferred to Pinal County; rather, Judge O’Neil ruled as a visiting judge in Maricopa County.

³Although the trial court addressed these issues on the merits, it was not required to do so. In light of our finding, as set forth below, that Romero was precluded from raising any of these claims in a Rule 32 petition, we decline to address the court’s ruling on the merits. Cf. *State v. Oakely*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App.

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Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II, 176 Ariz. 275, 278-79, 860 P.2d 1328, 1331-32 (App. 1993), to conclude that Judge O'Neil's ruling (claim four) was the law of the case, and thus determined it would not "revisit the merits" of that ruling.

¶13 On review, Romero contends: (1) the trial court should have addressed the challenges he raised to Judge O'Neil's ruling on the merits, and asserts that by relying on *Duren v. Missouri*, 439 U.S. 357 (1979), Judge O'Neil exceeded the scope of Judge Mundell's order; (2) Judge Mundell lacked the authority to refer "certain issues" to Judge O'Neil; and, (3) because Romero "did not have a full and fair opportunity to appear before Judge O'Neil and conduct discovery or present evidence," neither collateral estoppel nor the law of the case doctrine applies, and he thus is not bound by Judge O'Neil's ruling.

¶14 To the extent Romero asserts this court's ruling on appeal and the trial court's refusal to address his challenges to Judge O'Neil's ruling on the merits have "decimated" his right to appellate review, we disagree. Romero was effectively part of a group whose claim regarding the jury selection process was denied by Judge O'Neil on the merits. And, as part of that same group, Romero attempted to appeal Judge O'Neil's ruling without success. See *Jury Selection Process in Maricopa Cnty.*, 220 Ariz. 526, ¶ 14, 207 P.3d at 784. However, as previously noted, in our ruling on appeal this court left open the alternative to seek review of Judge O'Neil's ruling as an individual, an option Romero did not exercise. *Id.* ¶ 14. Specifically, Romero did not seek, as an individual, appellate or special action relief directly from Judge O'Neil's 2007 ruling. Ostensibly with that goal in mind, he filed a motion to sever his case from the consolidated matter, and upon the granting of that motion two years after he first filed it, he sought post-conviction relief in 2012, more than four years after Judge O'Neil had ruled.

1994) (appellate court will affirm trial court "when it reaches the correct result even though it does so for the wrong reasons").

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¶15 Notably, in his 2012 petition for post-conviction relief, Romero did not assert that the claims raised in his successive petition were exempt from preclusion, even assuming those claims were cognizable under Rule 32.1. *See* Ariz. R. Crim. P. 32.2(a)(3) (“A defendant shall be precluded from relief under this rule based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.”); *see also* Ariz. R. Crim. P. 32.2(b) (exceptions to preclusion). Although Romero asserted in his 2006 petition that his claims were exempt from preclusion based on newly discovered evidence pursuant to Rule 32.1(e), he did not raise any such argument in his 2012 petition.⁴ Moreover, the record does not suggest the existence of any newly discovered evidence between 2007, when Judge O’Neil ruled in the consolidated matter, and the filing of Romero’s 2012 petition. Consequently, because Romero could have but did not challenge on an individual basis Judge O’Neil’s ruling by filing a direct appeal or a special action petition,⁵ and in the absence of any exception to preclusion, we conclude Romero is precluded from raising any such challenge in a Rule 32 proceeding now.⁶ *See* Ariz. R. Crim. P. 32.2(a)(3).

⁴In his reply to that petition, Romero criticized the state’s “vague reference” to his claim of newly discovered evidence in its response thereto; he failed to note, however, that he had not raised any such claim in that petition. *Cf. State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7, 221 P.3d 1052, 1054 (App. 2009) (trial court not required to consider claim raised for first time in reply brief and by extension, in reply to response to Rule 32 petition).

⁵We note that Romero contends he “sought leave to file a petition for review to the Arizona Court of Appeals, to argue PWS violated his Sixth amendment right to a jury trial” in November 2007, the month after Judge O’Neil ruled.

⁶We additionally reject Romero’s assertion that this court may not find his claims precluded in light of the state’s alleged failure to plead and prove that ground. *See* Ariz. R. Crim. P. 32.2(c) (“Though the state has the burden to plead and prove grounds of preclusion, any court on review of the record may determine and hold that an issue is precluded regardless of whether the state raises preclusion.”).

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¶16 Finally, we do not address Romero’s argument, apparently raised for the first time on review, that in the absence of an “agency relationship” with the attorneys who represented the petitioners in the consolidated matter before Judge O’Neil, he is not bound by their actions. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issue not presented first to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶17 Accordingly, although we grant review, relief is denied.